

UNITED STATES
v.
J. GARY FEEZOR ET AL.
(ON RECONSIDERATION)

IBLA 79-407
74 IBLA 56, 90 I.D. 262 (1983)

Decided May 29, 1984

Petition for reconsideration of decision styled *United States v. Feezor*, 74 IBLA 56, 90 I.D. 262 (1983).

Petition granted; prior decision vacated in part; case remanded to Hearings Division.

1. Rules of Practice: Appeals: Reconsideration

Where, subsequent to a decision issued by the Board, which decision is premised on certain factual assumptions, a party establishes on the basis of the record before the Board that the facts may not be as assumed, and, as a result, it becomes impossible for the Board to fairly determine the true underlying facts essential to adjudication, the Board decision will be vacated and the case will be remanded to the Hearings Division for a hearing to clarify the matter.

APPEARANCES: Leo N. Smith, Esq., and Patricia G. Munger, Esq., Tucson, Arizona, for appellants; John W. Burke III, Esq., San Francisco, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision styled *United States v. Feezor*, 74 IBLA 56, 90 I.D. 262 (1983), this Board affirmed the decision of Administrative Law Judge E. Kendall Clarke declaring the Copper Lodes Nos. 1, 2, 3, 5, 7, 8, 9, 10, 13, 14, and 28 mining claims, which were located within the exterior boundaries of the Death Valley National Monument, null and void for lack of a discovery of a valuable mineral deposit.

The Board's decision dealt essentially with two major questions. The first question examined was the extent to which geologic inference could be used to establish the existence of a discovery of a valuable mineral deposit, once an exposure of a mineral deposit was shown to exist. Having determined the permissible parameters in which geologic inference could be used, the

Board then analyzed the record of the case to determine what inferences could properly be drawn from the evidence. The major source of controversy on this latter issue was whether various chip or channel samples taken by Occidental Minerals Corporation (Oxy) could be correlated with a series of holes drilled primarily by one Richard E. Mieritz on claim Nos. 1 and 2, in an area on the claims referred to both as the South Body and Area A. The Board's conclusion was that no such correlation had been demonstrated and accordingly it determined that "the chip samples taken in the instant case do not give results sufficiently reliable so as to permit estimates of values at depth on the sole basis of favorable surface showings." *Id.* at 89, 90 I.D. at 281. In view of this finding, the Board held that the evidence of record was insufficient to establish the existence of sufficient quantity of low grade copper mineralization which would justify a prudent man in the expenditure of his labor and means with the reasonable prospect of success in developing a paying mine. Therefore, the Board held that all of the challenged claims must be found null and void.

On August 3, 1983, appellants filed a petition seeking reconsideration of the Board's decision. This petition did not challenge the Board's ruling concerning the permissible use of geologic inference. Rather, it was limited to the Board's factual findings that there was no correlation established between the results obtained from the chip sampling and those derived from the drill holes. Because of the importance of this question to the ultimate disposition of the appeal, and in light of the showing made by appellants in their petition, we have determined that their petition seeking reconsideration of the matter should be granted. ^{1/}

In order to place appellants' contentions in perspective, it will be necessary for the Board to review, in some detail, its earlier conclusions and the reasons therefor. The thrust of appellants' theory was that the surface sampling conducted by Oxy was sufficiently reliable, particularly

^{1/} In his opposition to the request for reconsideration, counsel for BLM requested that, should the Board determine that "extraordinary circumstances" justified the granting of the petition (as required by 43 CFR 4.21(c)), this Board provide him with copies of all of the exhibits in order to make a proper response. While we recognize that present counsel did not represent BLM at the hearing or during the Board's original consideration of the appeal, the general practice of the Board assumes that counsel for BLM will substantively respond, should he or she so desire, prior to a ruling on the grant of a petition. Moreover, a number of the relevant exhibits are not amenable to reproduction because they are oversized, while others consist of transparencies to be placed over certain maps. Despite this, we would normally have made the exhibits available for counsel's inspection. However, our review of the relevant exhibits in light of the petition convinces us that there is simply no way for counsel for BLM, within the context of the present record, to rectify the evidentiary problems described in the text. Such action can best be attempted at the new hearing which we are hereby ordering. For this reason, counsel's request is hereby denied.

when correlated to the drill holes, so as to properly serve as a predicate for making reserve estimates of mineable ore. ^{2/} The Government, on the other hand, argued that mere surface sampling was inherently unreliable for such a purpose, and further argued that, in fact, there was no demonstrated correlation between the chip samples and the drill holes. Appellants countered BLM's argument by asserting that the Government's map (Exh. 6), prepared by Robert Mitchum, had erroneously shown the location of the Oxy surface samples in relation to the drill holes. Appellants contended that their map (Exh. G), prepared by James B. Fletcher, correctly showed the relationship of the Oxy samples to the Mieritz drill holes.

In reviewing this issue, the Board had occasion to reference the many varying maps submitted in the case. In examining the conflicting depictions of the sample sites we observed: "Appellants suggest that [the Government's] error can be seen by comparing the Mieritz map (Subexh. 5 to Exh. 4) with Fletcher's map (Exh. G). Our independent review of the various exhibits, however, leads us to the opposite conclusion, that contestees' Exhibit G misplaced the drill holes." *Id.* at 87-88, 90 I.D. at 280. We then proceeded to compare the two maps, with reference to the common claim line between claim Nos. 1 and 2. Thus, we noted that both maps were actually in agreement as to the placement of the Oxy surface samples. They differed, however, in the location of the various Mieritz drill holes.

In particular, we focused on drill hole H-61, which had shown minimal values throughout its 60-foot depth. On the Mitchum map, chip samples 53 and 108, which had shown copper values of 0.62 and 0.76 percent, respectively, were placed northeasterly of drill hole H-61, and, thus, outside of the ore body in Area A that had been delineated by Mieritz' drilling. In contradistinction, Fletcher's map indicated that drill hole H-61 was north of the two chip sample sites. Effectively, the Government's map supported its position that the surface sampling shows anomalous results, whereas appellants' map buttressed their argument that the surface sampling was consistent with results obtained by the drilling program. Obviously, however, both maps could not be correct. Thus, the Board determined that "the correct placement of this drill hole is controlled by the Mieritz map (Subexh. 5 of Exh. 4)." *Id.* at 89, 90 I.D. at 280.

The Board then proceeded to analyze the "Mieritz" map:

The Mieritz map places H-61 approximately 980 feet north of the endline and 50 feet east of the sideline. Not only does the Mieritz map support the Government's exhibit, it lends greater weight to its conclusions, since it actually places the

^{2/} As noted in our decision, while a defined ore body was known to exist within Area A, all parties conceded that the tonnage so delineated was insufficient to justify the capital expenditures necessary to successfully mine that deposit. *Id.* at 91, 90 I.D. at 281-82. Thus, the existence of sufficient mineable reserves to justify capital expenditures was the focal point of most of the evidence.

drill holes further south of the surface samples than the Government has indicated. Thus, chip samples 53 and 108, which showed good values, are beyond the limits of the ore body as defined by the Mieritz drilling. We have come to the conclusion, therefore, that the chip samples taken in the instant case do not give results sufficiently reliable so as to permit estimates of values at depth on the sole basis of favorable surface showings.

Id. As a result of this analysis, the Board concluded that the chip samples taken by Oxy had not been shown to correlate with values at depth within Area A and, thus, the fact that certain surface samples had shown values existing beyond the defined ore body, particularly in the southeast, 3/ was not probative of whether such an extension of the main ore body occurred at depth.

In their petition for reconsideration, appellants argue that the map which the Board referred to as the "Mieritz" map was, in fact, prepared by Robert D. O'Brien, a Government mining engineer. Appellants emphasize that this map, while based on the Mieritz maps, differs from the original Mieritz maps in that it includes claim corners, not present on the Mieritz maps. This point is of particular relevance since the Board's analysis of the disparity between the Government's exhibit 6 and contestees' exhibit G was grounded on the position of the claim corners in the "Mieritz" map (Subexh. 5 of Exh. 4). In light of these contentions we have exhaustively reviewed all of the maps submitted in this case and have come to the conclusion that appellants' objection may, in fact, be well-based.

As noted above, the map which this Board denominated as the "Mieritz" map was subexhibit 5 of exhibit 4. All notations on the face of the map indicated that it had been prepared by Mieritz, and nothing in exhibit 4, a 1977 mineral report submitted by O'Brien, stated anything to the contrary. Appellants point out, however, that this map is a larger copy of a map attached to an earlier 1974 report prepared by O'Brien. This map is found as subexhibit 3 of exhibit F. In that earlier report, O'Brien clearly stated that "Exhibit No. 3 which was adapted from Map No. 6, by Richard E. Mieritz, shows the locations of all the drill holes." (Emphasis supplied.) Appellants plausibly suggest that, since Map No. 6 did not show any claim corners on it, part of the adaptation must have been the addition of the claim corners.

In this regard, we must note that the copy of the Mieritz report which was submitted to the Board (Exh. 2), while referencing a "Map No. 6," did not contain that map. Appellants, however, have provided us with a copy of that map in their petition for reconsideration. As appellants contend, this map does not show claim corners, nor does it show the situs of the Mieritz drill

3/ Mieritz had expressly noted in his report (Exh. 2), that the drilling program "did not delimit the ore body completely, extensions being possible in three directions; namely, northward, northeasterly and mainly southeasterly - toward a second known area of mineralization." See Exh. 2 at 4-5 (emphasis in original).

holes, instead depicting, by reference to existing roads, the location of holes drilled before the onset of the Mieritz drilling program. It could be supposed, therefore, that the map which the Board had referred to as the "Mieritz" map had been "adapted" by superimposing the Mieritz Map No. 5, which showed the placement of drilling holes by Mieritz, onto Map No. 6, which showed the prior drilling activities, and then adding claim corners.

While this would, in fact, explain what was meant by the statement in the 1974 O'Brien report that the map was "adapted" from Mieritz Map No. 6, it does not totally answer all of the questions raised by an analysis of sub-exhibit 5 of exhibit 6. Mieritz Map No. 5 shows that it was drafted in July 1969. Mieritz Map No. 6, on the other hand, bears a date of March 1971. This latter date also appears on subexhibit 5 of exhibit 4. However, subexhibit 5 contains a "Registered Geologist" seal, over which Mieritz' signature appears, while both Map No. 5 and Map No. 6 contain a seal attesting that Mieritz was a "Registered Professional Engineer (Mining)." Thus, the presence of the Mieritz seal on subexhibit 5 cannot be explained by a hypothesis that the seal was inadvertently picked up in duplication of Map No. 6. Moreover, for some equally unexplained reason, the Mieritz signature on subexhibit 5 clearly shows a date of March 7, 1974, almost exactly 3 years after the date of his report. See Exh. 2. How this could be, unless Mieritz had somehow approved the "new" map, is inexplicable on the basis of the present record. Leaving such speculation aside, however, we must agree with appellants that the questions surrounding the preparation of subexhibit 5 of exhibit 4 deprives it of the controlling weight which we accorded it in our previous decision.

Appellants suggest that their composite map, prepared by Fletcher, should, itself, be accorded controlling weight, since it was prepared by reference to the roads and topography shown on the Mieritz Map No. 5. Appellants contend that topographic comparison is the only possible way of correlating the chip samples with the drill holes since, appellants argue, "topography is the only common reference point."

The problem with this statement is that the Oxy map does not show topographic relief. See Exh. C and Subexh. 6 of Exh. 4. On the contrary, the only reference point in the Oxy map which could be used to orient the samples is the exterior boundaries of the claim group. Appellants, themselves, contend that individual claim boundaries are not susceptible to precise projection and, assuming this is so, it is equally difficult to see how the exterior boundaries could be so projected with precise accuracy. In short, it is our view that we are now faced with a record with so many imponderables on a crucial issue of fact that it is not possible for this Board to make an informed judgment as to the efficacy of the surface sampling program in the instant case. Accordingly, while we recognize the considerable period of time which has already been taken in determining the validity of the subject claims, we have no alternative but to remand this case to the Hearings Division for a further fact-finding hearing.

Having reached this conclusion, the next question to be decided is the scope of the hearing on remand. As we noted in our first decision, three

separate areas of mineralization were in dispute. While the focus of the hearing will be the attempted correlation of surface sampling sites and drill holes in Area A, the results of this correlation, particularly if appellants are successful, will clearly have an effect on Area B. While we do retain considerable doubt as to the ability of appellants to show the existence of a valuable mineral deposit in Area B, particularly in view of the Mieritz drilling in that area, we feel that appellants should be afforded an opportunity to attempt to show the validity of the claims in this area in the context of further examination of the reliability of the surface sampling results.

However, insofar as Area C is concerned, it is our view that the sampling done in that area, much of which was only soil sampling, could not establish that a qualifying discovery existed on the two claims, even if appellants successfully establish that the Oxy surface sampling does correlate to known values at depth. Indeed, as we noted in our first decision, "with reference to Area C, there was virtually no showing, whatever, that mineralization in a vein structure even existed." *Id.* at 91, 90 I.D. at 282. Accordingly, the Board hereby reaffirms its original holding that the Copper Lode claim Nos. 10 and 28 are null and void.

The Administrative Law Judge shall have full authority, consistent with the legal rulings of the Board in our original decision, both to determine whether or not the surface sampling has been shown to be consistent with the results of the drill hole program and also whether a discovery has been shown to exist within the limits of the various claims, both at the time of the withdrawal in 1976, and at the present time. Appellants, as proponents of the validity of their claims, shall have the burden to preponderate on both questions. *See Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959). The Judge shall issue an initial decision from which any party adversely affected may seek review by this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, so much of the Board's decision as declared the Copper Lodes Nos. 1, 2, 3, 5, 7, 8, 9, 13, and 14 null and void is vacated, and the case files are remanded to the Hearings Division for further action consistent with the views expressed herein.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

